No. 18,416

United States Court of Appeals

For the Ninth Circuit

HANS ZIMMERMAN and CLARA ZIMMERMAN,
Appellants,

vs.

UNITED STATES OF AMERICA and District Director of Internal Revenue,
Appellee.

Appeal from the United States District Court for the District of Hawaii

OPENING BRIEF FOR APPELLANTS

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JURISDICTION

This action was commenced in the United States District Court of Hawaii for the refund of income taxes illegally and erroneously collected by the Appellee from the Appellants. The claim for a refund was made pursuant to 26 U.S.C. Sec. 166 (a) (1), Sec. 2511 (d). Jurisdictional facts were alleged in Count I and Count II of the complaint (I.R. 3-10). Jurisdiction of the United States District Court was conferred by 28 U.S.C. Sec. 1346 (a) (1).

The action was tried by the court without a jury. The Decision, Findings of Fact and Conclusion of Law

were filed on July 23, 1962 (I.R. 12). Judgment was entered on August 15, 1962 (I.R. 22). A motion for New Trial and to Open Judgment was filed September 19, 1962. (I.R. 36). Notice of Appeal was filed in the District Court on October 19, 1962. (I.R. 38). Jurisdiction is conferred upon this Court by 28 U.S.C. Sections 1291, 1294, and 2107.

STATEMENT OF THE CASE

Nature of Action and Claim.

Appellants, husband and wife, brought this action to recover income taxes erroneously assessed and collected by the United States in the year 1955 or prior allowable years. Appellants' claim for a refund was based on the refusal of Appellee to allow as a deduction under 26 U.S.C. Sec. 166 (a) (1) a business bad debt loss of money loaned by Appellants to the National Medical Society, an Illinois non-profit Corporation, hereinafter referred to as the *Society,* during the years 1944 to 1955. (I.R. 10-14.) The loss was incurred in Dr. Zimmerman's business and profession of a naturopathic physician and editor of the medical journal published by the Society. (II.R. 52.)

Issues Tried and Decided.

A pre-trial order was entered limiting the issues of fact and law to be tried by the Court without a jury. (I.R. 9-11.) Under the pre-trial order, Appellees, for the purpose of the trial admitted that Appellants had delivered the sum of $41,247.73 to the Society during

the years 1944 to 1955, (I.R. 10), which the Society had acknowledged (I.R. 20, line 27). The serious, if not sole, defense of Appellees was that the money paid to the Society was a contribution and not a business debt (I.R. 9, lines 29-30). The ultimate factual issues fixed by the pre-trial order were:

> (1) "When the monies were *delivered* to the National Medical Society, did Plaintiffs (Appellants) intend to make a loan or a gift to the Society?" (I.R. 11) (Emphasis added).
>
> (2) "When such monies *were delivered,* was there any reasonable expectation that the Society could repay the monies to the Plaintiffs?" (I.R. 11) (Emphasis added).
>
> (3) "Assuming that a loan *was created,* what year or years was the bad debt created?" (I.R. 11) (Emphasis added).

The point of law at issue under the pre-trial order was:

> "Whether or not a valid debt exists, which is deductible under Sec. 166 of the 1954 Code" (26 U.S.C. Sec. 166 (a) (1) (I.R. 11).

Accounting problems were to be solved after the determination of the issues of fact and law (I.R. 11).

The only witness at the brief trial was Appellant, Dr. Zimmerman. The major portion of his testimony was devoted to identifying, explaining and corroborating the exhibits in evidence. (II.R. 2-59.) An attempt was made during the trial to confine the evidence to the issues set forth in the pre-trial order (II.R. 56-7).

At the conclusion of the testimony, the court indicated that the only problem involved in its decision was one of law, namely, whether a loan not payable at a specific time created a debt. (II.R. 62.)

The court after taking the case under advisement found that Appellants did not prove that the advances of money to the Society, resulted in a business bad debt loss under the Internal Revenue Code. Judgment was accordingly entered for Appellees. (R. 21-22.)

A motion for New Trial and to Open Judgment was filed based on the court's inquiry into facts outside of the scope of the pre-trial order, and subsequent use in the findings, of facts thereby elicited. (I.R. 25-29.)

The motion was denied by the Court. (I.R. 37.) Appeal was taken from the Judgment and Order Denying the Motion for New Trial and to Open Judgment. (I.R. 39.)

Facts in Evidence.

Dr. Zimmerman was a licensed naturopathic physician in the active practice of his profession in Honolulu, on December 7, 1941, at the outbreak of the war with Japan. (II.R. 4.) He was compelled, through no fault, to move to Chicago, Illinois. There, in 1943, he became interested in organizing the National Medical Society, a non-profit national organization of all the healing professions, including naturopathy (II.R. 3-5). In addition to his altruistic professional aims, he was motivated by the expectation of income from the Society, through the publication and editing of the professional Journal of the Society. (II.R. 52.) He also expected and anticipated that his active association with

the Society would result in an increase of income from his practice when he was able to return to Honolulu. (II.R. 7-8.)

The Society was incorporated in Illinois in November, 1943, and in Washington, D. C. in 1945, as a non-profit corporation. (I.R. 48-55.) The purposes of the Society are set forth in the by-laws which were in essence, to promote and foster the advancement of all the professions engaged in the healing arts and sciences. (I.R. 48.) The funds necessary for the functioning of the Society were to be raised by membership dues determined by the Board of Directors and special contributions. (I.R. 50.) The by-laws provided for the publication of a professional journal to be prepared and issued by an editor to be appointed, and his compensation fixed by the Board of Directors. (I.R. 50.) Dr. Zimmerman was appointed the first editor of the Journal. (II.R. 24.)

The first fiscal year began January 30, 1944 and ended January 31, 1945. (I.R. 53.)

On April 5, 1944 at a meeting of the directors, the question of finances and lack of funds for the proper operation and administration of the Society was raised and debated. Dr. Zimmerman offered, and the Society by motion accepted his offer to advance the finances necessary to set up administrative headquarters, (I.R. 49) organize and operate the office, and prepare and publish the Journal. (I.R. 49, II.R. 13.) The preparation and publication of the Journal required considerable money. (II.R. 19.) It was agreed that he would advance the money until the time when the organization could carry itself financially, and that the organi-

zation would repay him such amount that was possible without jeopardizing the Society. (II.R. 14.) The source of repayment was to be from dues and contributions from members. (I.R. 50, II.R. 14.) Although no specific time was set for repayment in the beginning, the Society had anticipated a membership of 50,000 members in approximately 5 years and the dues of $10.00 from each member was expected to be the source of payment. (II.R. 17-18, 42.) Thereafter the financial history of the Society was briefly:

On August 4, 1945 the Society's accountant issued the first financial report stating that "there was due Dr. Hans Zimmerman an amount of $5,538.55 for money advanced by him to the Society." (I.R. 53). The report showed the expenses of the Journal to be $4,449.13. The net deficit of the Society was $1,252.01. (I.R. 53.)

The Society's financial statement, ending October 2, 1945, showed an income of $10,460.57, and a net deficit of $5,743.78. The liabilities listed an item "advanced cash payable to Dr. H. Zimmerman $6,491.00." (I.R. 54.)

In October 20, 1945, the poor financial situation of the Society, and the advisability of an assessment on the membership to carry on its work, was discussed by the directors. All the discussed plans were abandoned as unsatisfactory. (I.R. 55.) At the same meeting, the Society unanimously adopted a motion "that Dr. Zimmerman be repaid the monies he advanced to the Society at the earliest opportunity." (I.R. 55.) Thereafter, Dr. Zimmerman continued to make advances to

the Society in order to further the program and save this investment. (II.R. 23.)

* * * * * * *

"On March 19, 1949, the fortunes of the Society had so declined that the National President Gobar wrote to Dr. Zimmerman about 'the precariousness of our financial condition' and stated 'we are all highly encouraged about the outlook for a very successful membership drive, there is nothing wrong with the Society that 25,000 new members wouldn't cure. We firmly expect this number during the next 18 months.' Gobar pleaded for more money to operate and publish the Journal and then stated: 'Frankly, I think you should be VITALLY interested in the future of the Society, for the repayment to you of the money you have already expended is entirely dependent on the financial success and, if at this time your support is withdrawn, we will have no other alternative but to close up shop.' 'Under these circumstances your statement that "I don't much care" makes me feel a little reluctant about signing any statement of indebtedness for the N.M.S. for the $21,223.20 you have invested.'" (I.R. 69.)*

* * * * * * *

"At the annual convention, September 8, 1949, the Society confirmed the indebtedness of the Society to Dr. and Mrs. Hans Zimmerman and set up certain modalities for eventual repayment." The

*The matter printed in italics is the substance of the exhibit appearing in full at the page of the record indicated. The matter in italics is not in evidence but was offered in evidence on the Motion to Reopen the Judgment. It is set forth in the statement of facts in the chronological sequence of events to enable the Court to evaluate its relative importance on the issue of the reopening of the judgment.

Society "approved the renewal of the contract between the Society and Dr. Zimmerman for a further period of 5 years whereby he was to act as editor in chief of the Journal." (I.R. 73, Par. (i) and (n).*

* * * * * * *

Appellants sent annual statements of the balance due on the funds advanced to the Society as follows: September 30, 1949, $28,310.75; December 6, 1949, $33,996.40. (I.R. 57.)

On December 31, 1949, the Society, on its balance sheet, acknowledged the advance account of Appellants to be $32,518.72. (I.R. 67.) The Washington accounting firm of Peat, Marwick & Mitchell, upon the request of the Society, examined the records and reported that on December 31, 1949, the Society owed Appellants $32,518.72. (I.R. 62-3.) The Society during (1949) repaid to Appellants about $10,000.00. (II.R. 45.)

* * * * * * *

*"On February 20, 1950, the Society paid, and Appellants acknowledged the receipt from the Society of $10,543.63, and the value of jewelry as a credit on the advance account. (I.R. 72), See also (I.R. 72). During the period from March 1949 through August 9, 1950, Appellants advanced over $12,000.00. (III.R. 18), to the Society."**

* * * * * * *

*The matter printed in italics is the substance of the exhibit appearing in full at the page of the record indicated. The matter in italics is not in evidence but was offered in evidence on the Motion to Reopen the Judgment. It is set forth in the statement of facts in the chronological sequence of events to enable the Court to evaluate its relative importance on the issue of the reopening of the judgment.

On January 4, 1950, the Society acknowledged that the net amount due Appellants was $31,295.72. (I.R. 64.)

Thereafter, the following annual statements of indebtedness were mailed by Appellants to the Society: December 31, 1950, $41,371.36; December 31, 1951, $40,-054.48; December 31, 1952, $40,017.54; December 31, 1954, for the years 1954, and 1955, $40,171.49, and on December 31, 1955, $38,132.74. (I.R. 58, 59, 60, 61.)

The Society in its bookkeeping kept separate accounts for contributions and advances by Appellants. (I.R. 54.)

The Society gradually disintegrated during the years 1950 to 1955 to a point where at the end of 1955 Appellants refused to advance any more money and considered the entire debt uncollectable. (I.R. 123, 127, 129-30.)

During these declining years credits were given to the Society against the total indebtedness which were listed by Appellants on their tax returns as charitable contributions, to wit: 1951, $3,000.00; 1952, $1,000.00; 1953, $1,000.00, and in 1955, $2,100.00 (I.R. 58, 59, 60, 61).

At no time did Appellants attempt or intend to treat the entire indebtedness as a charitable contribution. (II.R. 28.)

Appellants on October 2, 1952, filed a claim for the refund of income taxes based on this bad debt loss. Appellees denied the claim which resulted in this action May 7, 1958. (I.R. 5.)

QUESTIONS INVOLVED

1. The court's error in making Findings of Fact which were induced by and based on an erroneous misapprehension of the controlling principle of law; and in making certain Findings not clearly supported by the evidence.

2. The abuse of the court's discretion in refusing to permit the reopening of the judgment in order to introduce additional evidence to rebut the Findings resulting from the court's excursion into facts outside of the scope of the pre-trial order.

SPECIFICATIONS OF ERRORS RELIED UPON

I

That the Findings of Fact and Conclusions of Law Were Induced by and Based on the Erroneous Misapprehension of the Court of the Controlling Principle of Law That a Debt Does Not Have to Be Repayable at a Specific Time in Order to Qualify as a Deductible Business Bad Debt Under 26 U.S.C. Sec. 166 (a) (1).

This specification is based on the following record:

> "The Court. There is one thing that bothers me. I have not decided this case until a few moments ago, if I have still decided it. There is only one problem and that is the problem of the type of law to be applied. Counsel for the Government has urged that it could not have been a debt created because there was no unequivocal, absolute promise to repay at a time certain; that there was no certainty here as to when the claimed debt would be repaid; and, therefore, as a matter of law, it cannot be treated as a debt." (II.R. 62.)

From the Findings of Fact

"In the beginning, the Society had no funds, so Dr. Zimmerman offered to advance the money necessary to carry on the business of the organization until the organization could carry itself. *He said that he expected repayment from the dues of the members, but a specific time for repayment was never mentioned.*" (I.R. 13, lines 16-21) (Emphasis added.)

"Dr. Zimmerman testified: '. . . minutes of the meeting reveal the subject, but primarily I offered to advance the money until the time when the organization could carry itself financially, and then that the organization should repay me at whatever amount that was possible without jeopardizing the organization. *The evidence is conclusive that the members and directors of the Society were filled with good intentions to repay Dr. Zimmerman for the monies he had advanced, but the records, as well as Dr. Zimmerman's testimony, unequivocally show that there was never any specific time or manner in which these monies should be repaid him'.*" (I.R. 17, lines 16-26) (Emphasis added, but court underscored "Never".)

From the Conclusions of Law

"A reasonably fixed maturity date is also an essential element of a business debt; there must be an expectation that the so called debt would be *repaid at a determinable time.*

"There was no definite time for repayment of this money advanced to the Society." (I.R. 19, lines 26-8.)

"From the above analysis, it clearly appears that *none of the normal indicia of a classic debt*

appear in this case save and except that Dr. Zimmerman claimed and the Society acknowledged an obligation for the money he advanced to it." (I.R. 20, lines 23-27) (Emphasis added.)

"As above indicated, the court is satisfied that the obligation of the National Medical Society to Dr. Zimmerman *does not fit into any of the accepted definitions of a 'debt' either personal or business, within the meaning of the Internal Revenue Code.*" (I.R. 20) (Emphasis added.)

II

The Court Clearly Erred in Making the Following Findings of Material Facts Which Were Not Supported by and Were Contrary to the Evidence and the Record:

(1) *That Dr. Zimmerman never actually expected* to be repaid any of the monies which he continued to advance, as shown by the record. (I.R. 18, lines 10-19, I.R. 20, lines 15-18.)

(2) *That the advances made did not create a business debt.* (I.R. 20-21, lines 27-32, 1-3.)

III

That the Court Clearly Erred in Finding, as a Result of the Misapprehension of the Evidence Relating to the Deductions on Appellants' Tax Returns, That Appellants Reported and Treated the Advances Made to the Society as Contributions.

The following is the record of the erroneous Findings of Fact:

"The fact that he himself reported the advances from time to time as 'donations' and 'contributions' . . ." (I.R. 18, lines 11-12.)

"Dr. Zimmerman himself, treated his advances, in part at least as 'contributions' and 'dona-

tions' and he continued so to advance, contribute, and donate during all the years for which he now contends he should be permitted to claim these *same advances, donations and contributions* as a business bad debt." (I.R. 19, lines 31-32, I.R. 20, lines 1-5.)

IV

The Court Abused Its Discretion and Erred in Denying Appellants' Motion to Reopen the Judgment for the Purpose of Introducing Documentary Evidence to Rebut Unjustified Findings of Fact and Inferences Resulting From the Court's Exploration of Facts Outside of the Scope of the Pre-Trial Order.

The grounds of the Motion are set forth in the Motion, supporting affidavits and memorandum of law. (I.R. 25-29.) The Court denied the Motion to Reopen the Judgment. (I.R. 37.)

V

That the Court Clearly Erred in Its Ultimate Finding of Fact and Conclusions of Law That No Part of the Advances of Money by Appellants to the National Medical Society Constituted a Deductible Bad Debt Under 26 U.S.C. Sec. 166 (a) (1), as Shown by the Entire Record.

SUMMARY OF ARGUMENT

(a) The Findings of Fact were induced by and based on the erroneous view of the law that loan in order to qualify as a bad debt under the Internal Revenue Code must, at the time of its creation, be payable at a specific time. The findings were also contrary to the uncontradicted facts which the Court misapprehended or ignored with the result that all the Findings of Fact and Conclusions of Law were *clearly* erroneous.

(b) The Court abused its discretion and erred in denying the Motion to Reopen the Judgment to permit the introduction of authentic documentary evidence to rebut erroneous findings of the court resulting from the court's excursion into factual matters outside of the scope of the issues set by the pre-trial order. The abuse of discretion is based on the fact that the Motion to Reopen was invited by the court's action; that the reopening could not have resulted in any inconvenience or prejudice to Appellees; and that no substantial ground was given for the denial of the Motion.

POINTS OF LAW

1. *Findings of Fact that certain loans did not constitute bad debts under 26 U.S.C. Sec. 166 (a) (1) because the loans were not payable at a specific time were induced by and resulted from a misapprehension of law and should be set aside without the necessity of applying the "clearly erroneous" concept of review of Rule 52 (a) F. R. Civ. P. 28 U.S.C.*

2. *Findings of Fact which deny the existence of an entire bad debt under 26 U.S.C. Sec. 166 (a) (1) because the creditor, after the debt was created, gave partial credits against the debt in the form of donations or contributions, are based on a misapprehension of the nature and effect of the evidence and are clearly erroneous and should be set aside.*

3. *The denial without substantial grounds of a timely Motion to Reopen a Judgment made under the*

belief that the court has explored issues and made findings outside of the scope of the issues of a pre-trial order requiring the introduction of additional evidence to explain or rebut is an abuse of discretion.

4. *Findings consisting of inferences of ultimate facts which are unsupported by the evidence and disregard substantial evidence without justification should be set aside as "clearly erroneous" under Rule 52 (a) F. R. Civ. P. 28 U.S.C.*

ARGUMENT

1. FINDINGS THAT CERTAIN LOANS DID NOT CONSTITUTE BAD DEBTS UNDER 26 U.S.C. SEC. 166 (a) (1) BECAUSE THE LOANS WERE NOT PAYABLE AT A SPECIFIC TIME ARE INDUCED BY AND RESULT FROM A MISAPPREHENSION OF LAW AND SHOULD BE SET ASIDE WITHOUT APPLYING THE "CLEARLY ERRONEOUS" CONCEPT OF REVIEW OF RULE 52 (a) F. R. CIV. P. 28 U.S.C.

Specification of Error I is argued hereunder:

The record amply discloses that the court believed, and based its findings of fact on the belief, that the controlling legal principle to be applied to the facts was, that a debt at the time of its creation had to be payable at a specific time in order to qualify as a bad debt. (I.R. 13, lines 16-21; I.R. 17, lines 16-25.) In the oral decision the court stated:

> "There is one thing that bothers me. I have not decided this case until a few moments ago, if I have still decided it. There is *only one problem* and that is the problem of the type of law to be applied. Counsel for the Government has urged

that it could not have been a debt created because there was no unequivocal, absolute promise to pay at a time certain; that there was no certainty here as to when the claimed debt would be repaid; and, therefore, as a matter of law, it cannot be treated as a debt." (II.R. 62.)

The pertinent portions of the Findings of Fact and Conclusions of Law are:

"In the beginning, the Society had no funds so Dr. Zimmerman offered to advance the money necessary to carry on the business of the organization until the organization could carry itself. *He said that he expected repayment from the dues of the members, but a specific time for repayment was never mentioned*" (I.R. 13, lines 16-21.) (Emphasis added)

"Dr. Zimmerman testified: '. . . minutes of the meeting reveal the subject, but primarily I offered to advance the money until the time when the organization could carry itself financially, and then that the organization should repay me at whatever amount that was possible without jeopardizing the organization. *The evidence is conclusive that the members and directors of the Society were filled with good intentions to repay Dr. Zimmerman for the monies he had advanved, but the records, as well as Dr. Zimmerman's testimony, unequivocally show that there was never any specific time or manner in which these monies should be repaid him'.*" (I.R. 17, lines 16-26.) (Emphasis added, but court underscored "Never".)

"A reasonably fixed maturity date is also an essential element of a business debt; there must be

an expectation that the so called debt would be *repaid at a determinable time.*

"There was no definite time for repayment of this money advanced to the Society." (I.R. 19, lines 26-8.)

"From the above analysis, it clearly appears that *none of the normal indicia of a classic debt appear* in this case save and except that Dr. Zimmerman claimed and the Society acknowledged an obligation for the money he advanced to it." (I.R. 20, lines 23-27.) (Emphasis added)

"As above indicated, the court is satisfied that the obligation of the National Medical Society to Dr. Zimmerman *does not fit into any of the accepted definitions of a 'debt' either personal or business, within the meaning of the Internal Revenue Code.*" (I.R. 20.) (Emphasis added)

The law does not require that a loan be payable at a specific time in order to qualify as a debt under the Internal Revenue Code.

Title 26 U.S.C. Sec. 166 (a) (1) provides for the allowance, as a deduction, of any debt which becomes worthless within the taxable year. It does not define a debt.

The tax regulations of the Treasury Department related to 26 U.S.C. Sec. 166 (a) (1) provide:

"(c) Bona fide debt required. Only a bona fide debt qualified for the purpose of Sec. 166. A bona fide debt is a debt which arises from a debtor-creditor relationship based upon a valid and enforceable obligation to pay a fixed or determinable sum of money." (1 Fed. Tax Regulations

1962, P. 258 Sec. 1-166; 24 F. R. 6160, I.R.C. 1939.)

There is no requirement in the statute or regulations of a definite time for repayment. No case construing this statute has been found where a loan was denied the status of a debt solely on the ground of the indefiniteness of the time of payment.

In *Byrelite Corp. v. Williams,* (C.A. 6) 286 Fed. 2d 285, the court held that advancements made without requiring evidence of debt, *fixed date of repayment,* interest, and with a realization that tangible assets of the corporation at any given time were not sufficient to repay, *did not* command disallowance of debt.

In *Huston v. U.S.* (D.C. Pa. 1951) 96 Fed. Supp. 199, the Court defined a debt for federal tax purposes as *an unconditional and legally enforceable obligation for the repayment of money.* "Unconditional" refers to the creation of the liability of the debt and not the contingency of payment. *Island Petroleum Co. v. Com'r* (C.A. 4) 57 Fed. 2d 992, 994.

A tax case in point is *Dallas Rupe & Sons, et al., v. Commissioner* (1953) 21 T.C. 363. In *Dallas* the taxpayer made cash advances to the Dallas Symphony Orchestra during three years, with intent that they should be *paid out of fund raising campaigns.* The fund raising campaigns were unsuccessful. The Court allowed the cash advances to be treated as bad debts.

The court on page 370 stated:

"Here *a debt was owed* to the taxpayer by the Symphony and was definitely so recognized by all

parties concerned. It was not dependent, insofar as being a debt was concerned, upon the happening of any contingency."

The *Dallas* case was approved by the Internal Revenue Service, 1953-2 C. Bulletin 6. It was also cited with approval by a subsequent tax court case, *Drachman v. Commissioner,* 23 T.C. 558, 562.

In *Gounares Brox v. U.S.*, 185 Fed. Supp. 794 (1960) the court held that a debt did exist even though there was *no maturity date fixed for the obligations* due the taxpayer and the *instruments evidencing the obligation were never executed.* See also, *Maloney v. Spencer,* (C.A. 9), 1949, 172 Fed. 2d 638, 641 (Open account advances).

The District Court in an attempt to distinguish *Dallas Rupe & Son*, found contrary to the evidence and the law, that the *liability* of the Society to pay the debt was contingent upon the success of the Society. (I.R. 19, line 30.) The only evidence is Dr. Zimmerman's testimony:

Q. Did you have an *arrangement with them by which* they would repay *money that you advanced to them?*

A. Yes.

Q. Would you state to the court what your understanding with the organization was?

A. Well, *the minutes of the meetings reveal the subject*, but primarily *I offered to advance the money until the time* when *the organization could carry itself financially,* and *then that the organization should repay me at whatever amount*

that was possible without jeopardizing the organization. (See Exhibit I.R. 49.)

Q. What was the understanding as to how you were to be paid for monies loaned to the National Medical Society?

A. I was going to be *repaid from the dues collected.*

Q. Was there any specific time mentioned for repayment of the monies which you were to advance or loan to them?

A. No, *no specific time.*

Zimmerman further testified he expected repayment from dues and contributions in about five years. (II.R. 18.) Under the by-laws of the Society, this was the only source of funds for payment of the expenses and debts of the Society. (I.R. 50.) Appellants did, in fact, receive $10,000.00 on account. (II.R. 45.) This court has reversed findings of fact resulting from the rejection, without good reason, of uncontradicted evidence. *Yip Mie York v. Dulles,* (C.A. 9, 1956) 237 Fed. 2d 383; *Joseph v. Donover,* (C.A. 9, 1958) 261 Fed. 2d 812.

The liability to pay the debt was fixed and acknowledged many times by the Society. (I.R. 54, 55, 64, 67.) The payment of the debt was contingent only on there being sufficient funds. This was the same condition of repayment existing in the *Dallas* case. See also, *Ewing v. Commissioner,* T.C. Memo 10/4/46

The court's view of the law was that a promise to pay from certain funds, or out of revenue, or if the company is successful, makes the liability to pay the

lebt conditional or contingent. This is not so. The ;ourt did not recognize the distinction between con-ingent creation of liability and contingent payment)f a debt.

In *Island Petroleum Co. v. Commissioner,* (C.A. 4) 57 Fed. 2d 992, 994, the court stated: "and it makes 10 difference in the result, if we construe the agree-nent as requiring repayment by the Texas Corpora-ion *only in the event that their operations should)rove successful. A loan is no less a loan because its epayment is made contingent.*" *Compare Bennett Glass and Paint Co. v. State Tax Com.* (Utah), 100 Pac. 2d 567; *Balaban v. Willett* (1950) 305 Ill. App. 88, 27 N.E. 612; *Knudsen v. Anderson* (1937) 199 Minn. 479, 272 N.W. 376.

In *Ricker v. Ricker*, 270 Pac. 2d 150, 153, the court quoted in support of its ruling, 58 C.J.S. Sec. 3 p. 878:

> ". . . where the agreement is that repayment is to be made when the debtor is able to pay the loan it is repayable after a reasonable time, and this has been held true of a promise to repay when convenient or when business picks up"

This court seems to have adopted the rule that in-erences drawn from undisputed facts induced by nd resulting from the erroneous application of a egal standard are not insulated by the "clearly er-oneous" concept of Rule 52 F. R. Civ. P., 26 U.S.C. nd should be set aside by the Appellate court. *Steve-ot v. Norberg* (C.A. 9, 1954) 210 Fed. 2d 615; *Lund-ren v. Freeman,* (C.A. 9, Nov. 1962) 307 Fed. 2d 104, 15. In *Lundgren* this court held that inferences of

fact from undisputed facts are subject to the "clearly erroneous" test of review, and indicated that inferences which have been derived from the application of an erroneous legal standard are not subject to the "clearly erroneous" rule. To the same effect, see *McGowan v. U.S.,* (C.A. 5, 1961), 296 Fed. 2d 253; *Davis v. Park-Hill Goodloe Co.* (Fla. 1962), 302 Fed. 2d 489; *Goldberg v. Commissioner,* (C.A. 9, 1955) 223 Fed. 2d 709; *Lehman v. Acheson,* (C.A. 3) 206 Fed. 2d 592.

In *McGowan,* a tax refund case, the court in reversing stated, page 254:

> "Of course the fact findings of the district judge came here with the buckler and shield of F.R. Civ. P. 52 (a), 28 U.S.C., because the findings carry such weight, we must be certain that . . . the trier of the fact has evaluated them in the light of proper legal standards."

Where a question of law is involved the Appellate Court applies the standard of whether the trial Court was wrong, and not clearly wrong. *Empress Hondurena de Vapores v. McLeod* (N.Y. 1962), 300 Fed. 2d 237.

2. **FINDINGS WHICH DENY THE EXISTENCE OF AN ENTIRE BAD DEBT UNDER 26 U.S.C. SEC. 166 (a) (1) BECAUSE THE CREDITOR, AFTER THE DEBT WAS CREATED, GAVE PARTIAL CREDITS AGAINST THE DEBT IN THE FORM OF DONATIONS OR CONTRIBUTIONS, ARE BASED ON A MISAPPREHENSION OF THE NATURE AND EFFECT OF THE EVIDENCE AND ARE CLEARLY ERRONEOUS AND SHOULD BE SET ASIDE.**

The Court after a recital of the uncontradicted evidence, "concluded or found" as follows:

> "He himself (Zimmerman) reported the advances, from time to time, as donations and contributions. . . ." (I.R. 18.)
>
> "Dr. Zimmerman, himself, treated his advances, in part at least, as 'contributions' and 'donations' and he continued so to advance, contribute and donate during all the very years for which he now contends he should be permitted to claim these same advances, donations and contributions as a business bad debt". (I.R. 19-20, lines 31, 1-6.)

These erroneous findings resulted from a misunderstanding by the court of the nature of certain deductions taken by Appellants on their tax returns and the relation of those deductions to the indebtedness existing at the time of the deductions. (I.R. 14-15.)

The uncontradicted documentary evidence disclosed the indebtedness owing Appellants at the end of the year 1951, was $40,054.48; at the end of 1952, $40,017.54; at the end of 1953, about $40,179.49; and on December 31, 1955, $38,132.74. (I.R. 58, 59, 60, 61.) At the end of each of these taxable years, a deduction for a charitable contribution was made in Appellant's tax

returns as follows: 1951, $3,000.00; 1952, $1,000.00; 1953, $1,000.00 and in 1955 $2,100.00. In the same years Appellants notified the Society in a financial statement of *a credit* in the same amount, against the indebtedness *then owed* Appellants by the Society. (I.R. 58, 59, 60, 61.) There is no evidence suggesting that these charitable contributions, *at the time* they were listed as deductions had any relationship to the total indebtedness resulting from prior advances, then owing to Appellants. These annual "donations" (not advances) were at first allowed as charitable deductions by the Internal Revenue Service. (I.R. 15, II.R. 53.) However, by a later ruling in 1946, the Internal Revenue Service reversed itself and held that the Society was not a "charitable organization" but a business league and disallowed the deductions previously allowed. (I.R. 15.) Appellants then paid income taxes on these "voided contributions". (I.R. 48.) It is important to observe that both the Society and Appellants treated "advances or loans" and "donations or contributions" in different accounts. (I.R. 54, 58-61.)

That the court misapprehended these facts appears from its attempt and failure to correlate the "voided" contributions to actual advances made in certain taxable return years. (I.R. 14.) As a result the court clearly and erroneously found, contrary to the evidence, that "he (Zimmerman) himself, reported the advances from time to time as donations". (I.R. 18, lines 10-12.) The facts are that no advances *at the time* they were made were reported as contributions.

It thus appears that the court thought that the "contributions" on the tax returns created the advances resulting in the indebtedness. The uncontradicted facts, however, established that a large indebtedness had been created and *was in existence* prior to the relatively small deductions claimed in each of these tax returns, and that the deductions in the tax returns were in effect forgivenesses or donations of a part of an existing debt. The deductions in the tax returns could not have affected the status of the debt *at the time it was created* and that was the only issue under the pre-trial order. (I.R. 11.)

It would seem, contrary to the court's inferences, that the fact that the Appellants made or attempted to make in certain taxable years charitable contributions to the Society *in addition* to the loans, indicates that the *advances,* carried on the books as liabilities, were not intended as contributions. Otherwise, there would have been no purpose in the Appellant and the Society treating debts and contributions in different entries in their accounts. (I.R. 54, 58, 61.)

This court has held that where the trial court misapprehends the effect of the evidence the findings are clearly erroneous and should be set aside. *Stevenot v. Norberg* (C.A. 9, 1954), 210 Fed. 2d 615. See also *U.S. v. Schultetus* (C.A. 5, 1960), 227 Fed. 2d 322; *Western Cottonoil Co. v. Hodges* (C.A. 5, 1954), 218 Fed. 2d 158, 161.

This Court in *Stevenot v. Norberg,* supra, in reversing the findings of the trial court stated, p. 619:

"Moreover, the finding under discussion must be considered in connection with the District Court's *assumption* that the discharges were invalid, unauthorized and in direct violation of the subsisting contract rights of Appellees . . . the record clearly indicates that the orders reinstating Appellees were based upon the conclusion that in discharging them, Appellant had violated their subsisting, enforceable contract rights."

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3. THE DENIAL WITHOUT SUBSTANTIAL GROUNDS OF A MOTION TO REOPEN A JUDGMENT, MADE UNDER THE BELIEF THAT THE EXPLORATION BY THE COURT OF THE FACTS OUTSIDE THE SCOPE OF THE PRE-TRIAL ORDER RESULTED IN FINDINGS REQUIRING ADDITIONAL EVIDENCE TO EXPLAIN OR REBUT, IS AN ABUSE OF DISCRETION.

Specification of Error IV is argued here:

The pre-trial order, as it was construed by appellant's counsel, limited the factual issues to whether Dr. Zimmerman *at the time* he advanced money to the Society intended to make a loan and had a reasonable expectation of repayment. (I.R. 11.) Accounting problems were to be solved, if necessary, after the determination of the issues in the pre-trial order. (I.R. 11.) An attempt was made during the trial to confine the inquiry into facts to the issues. (II.R. 56-7.)

During the trial the court examined Dr. Zimmerman on details relating to accounting records, amounts and dates and events which happened many years before. The subjects covered were not a part

of direct or cross-examination. The witness continued to assert he could not remember all the details and stated these were in records at home. (II.R. 54-5.) Counsel pointed out the irrelevancy of the factual inquiry in view of the pre-trial order as follows:

"Mr. Young. Your Honor, may I state at this time that in view of the pre-trial order these amounts do not become material.

The Court. Don't mistake me. I was seeing if I could say something that is bothering me by talking to counsel."

Apparently the court thereafter questioned counsel.

"Mr. Young. We would be prepared to prove that if it was necessary, but under the pre-trial order the Government made no contention that these amounts were advanced, and for the purpose of this trial it is admitted that existed as to this amount.

The Court. Well, I don't think it went that far, did it?

* * * * * * *

Mr. Young. And so, no attempt was made to give an exact accounting. We were merely trying to establish the nature of the obligation." (II.R. 57-8) (See also II.R. 30-31.)

The court continued to press for financial details in questions that were argumentative in form. (II.R. 57-8.)

When Dr. Zimmerman, in response to the court's questioning, was explaining why he continued to advance more money after he entertained fears about

repayment, *the court requested to see the correspondence of the Society assuring Zimmerman* that he could save the advances already made by advancing more. (II.R. 32-33.) This was the correspondence later found by Zimmerman and offered on the Motion to Reopen Judgment. (I.R. 68-70, III.R. 6-9.)

Notwithstanding the court's request to see the correspondence and his inquiry into these financial details the court at the conclusion of Dr. Zimmerman's testimony stated that the only problem was one of law and that there would be no further hearings necessary. (III.R. 62-65.)

However, when the Findings of Fact were read, it was discovered that the court had made findings of fact adverse to Appellants as a result of the inquiry into the financial details and concerning the subject matter referred to in the court's request for the correspondence of the Society. (I.R. 28-30.) In these findings the court found that Zimmerman continued to make advances without any reassurance or reasonable hope of expectation of repayment and hence never intended to be repaid. (I.R. 17-20.) (The error in this finding is presented in Point 4 to follow.)

A Motion for New Trial and to Open Judgment, with supporting affidavits as to the nature of the evidence desired to be introduced, was filed pursuant to Rule 59 (a) (2) and 52 (b) F. R. Civ. P. 28 U.S.C., within the time provided by the rule and as promptly as the circumstances allowed. (I.R. 24-35.) Rule 59 (a) (2) F. R. Civ. P. provides:

"On a motion for new trial in an action tried without a jury, the court may open the judgment, if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment."

In essence the Motion to Reopen was based on Appellant's surprise in learning that the court had based its findings of fact on matters *believed* to be outside the scope of the pre-trial order *and* on inferences contrary to the facts in evidence *which could be corroborated by the correspondence requested by the court.* On the basis of this surprise and belief, Appellants offered documentary evidence which corroborated Zimmerman and would rebut more cogently the erroneous inferences in the findings. (I.R. 21-35, III.R. 2-11.)

The offered exhibits 18 (I.R. 72), 17 (I.R. 68) and 19 (I.R. 73) explain and justify the further advances on money made after the financial decline of the Society. Exhibit 18 established the exact date and amount of the partial repayment of the debt justifying further advances. Exhibit 17 shows the pressure, through promises and threats, put upon Appellants to advance more money in order to save their investment. Exhibit 19 contains the minutes (the lack of which was commented upon in the Findings (I.R. 73)), acknowledging the debt and the consideration of a method (modalities) of repayment by the Society. All of these exhibits directly refuted the court's in-

ferences that Appellants never had any reasonable hope of repayment. (I.R. 18, line 16.)

The record does not disclose any objection by Appellee to the Motion to Reopen to introduce the same type of evidence which the Appellee had previously admitted without objection in the pre-trial order and during the trial. (I.R. 10, II.R. 29.) No claim was made by Appellee or the court that any one would be prejudiced or inconvenienced if the court reopened the judgment and received the proffered evidence.

The court summarily denied the motion to reopen on the grounds: (1) That counsel for Appellee, contrary to the avowed purpose and contents of the motion was in reality proceeding under Rule 60 (b) (2) F. R. Civ. P., and was seeking to avoid the new discovered evidence rule, and (2) that the offered documents would not change the court's findings (III.R. 12-25.) It is submitted that these were not reasonable grounds and the denial of the Motion was an abuse of discretion. Compare, *Haugen v. U.S.* (C.A. 9, 1946), 153 Fed. 2d 850.

The Motion to Reopen, the affidavits attached and the memorandum of law amply show that the basis of the Motion was the belief of Appellant that the erroneous findings resulted from the excursion of the court into facts outside the scope of the pre-trial order and that the offered evidence, some of which had been previously requested by the court, would result in a change of the erroneous findings by the court (I.R. 21-35.)

The court by stating that the offered evidence would not change its previous findings, in effect, found that all the evidence referred to by the court in its findings and relating to the expectation of repayment was not material to its decision, and corroborated the statement made in its oral decision that only a question of law was involved. (II.R. 62.)

In another context, this court, in *Lundgren v. Freeman* (C.A. 9, 1962), 307 Fed. 2d 105, quoted the following observation:

> ". . . It was better for the Appellate court to have the evidence, rather than mere findings of fact because trial judges tended to fashion the *findings of fact to support the result.*
>
> ". . . Moreover, to insure justice was done in jury cases—the trial judge could grant a new trial. *It was perhaps less likely the trial judge, himself the trier of the fact, would do this in cases tried without a jury.*"

One of the principal purposes of pre-trial is to crystalize and formulate issues to be tried and to present a complete statement of all contentions of the parties as to law and facts and *any contention not presented at pre-trial may not be raised at trial. Blanhen v. Bechtel Properties,* 194 F. Supp. 638 (1961).

In *Clark v. U.S.,* 13 F.R.D., 109 F. Supp. 213, Judge Fee stated on p. 345:

> "When a plaintiff has by his counsel advised the court and defendant of the theories upon which he relies and has given account of these, then the court should not adopt some other theory

of recovery, even if it should be believed that such a theory was more applicable. The other side has also a right to rely upon the theory stated by the counsel for the plaintiff and it is entire justice (not) to require the defendant to accept some theory of law propounded by the court for the first time in the opinion. Likewise, the defense in these cases very carefully sets up theories of defense. Here also the same considerations prevail. The defendant should be bound by such theories as well as the plaintiff, and the court should not find some other ground on which to deflect the attack. *If it should be believed either by trial judge or the Appellate judges that the theories are incorrect and do not fit the facts, then the case should be remanded for the purpose of drafting a new pre-trial order and these things should then be set forth."*

The rules relating to the reopening and vacating of judgments should be liberally construed to secure the just, speedy and inexpensive determination of every action. Rule 1, F. R. Civ. P. Cf. *Haugen v. U.S.* (C.A. 9, 1946), 153 Fed. 2d 850; *Gile v. Duke* (C.A. 9), S Fed. 2d 952; *Alaska United Gold Mining Co. v Keating,* 116 Fed. 2d 615; *U.S. v. Colangelo* (N.Y 1939), 27 Fed. Supp. 921.

The practical approach to the application of thi rule is exemplified in a recent case in the Suprem Court of the United States, *Foman v. Davis* (Dec 17, 1962), 9 L. Ed. 225, 83 S. Ct. . . .

In reversing the trial court's denial of a motion t vacate a judgment for the purpose of amending a complaint the court stated, pages 225-6:

" 'It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' *Conley v. Gibson,* 355 U.S. 41, 48, 2 L. Ed. 2d 80, 86.

* * * * *

"If the underlying facts or circumstances relied upon by a plaintiff, may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments, previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given'. Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, *but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.*"

In *Langness v. Green,* 282 U.S. 531, 51 S. Ct. 243, 247, 75 L. Ed. 520, 526, the court stated:

"The term 'discretion' denotes the absence of a hard and fast rule . . . When invoked as a guide

in holding that the findings of "a gift" were inadequate stated:

> "Such conclusory, general findings do not constitute compliance with Rule 52's direction 'to find the facts specially and state separately . . . conclusions of law thereon'. While the standard of law in this area is not a complex one, we foun think the unelaborated finding of ultimate fact here cannot stand as a fulfillment of these requirements. It affords the reviewing court not the semblance of an indication of the legal standard with which the trier of the fact has approached his task."

In any event it appears that the ultimate inference by the court that the advances did not create a debt are founded on the findings:

> (1) There was no specific time for repayment of the money advanced.
>
> (2) There was no expectation of repayment of the money advanced.

The error in the first finding has been argued. The error in the inference that Appellants never expected repayment is now presented.

Rule 52 (a) F. R. Civ. P. 28 U.S.C. provides that "Findings of fact shall not be set aside unless clearly erroneous."

This court in the recent case of *Lundgren v. Freeman,* (C.A. 9, 1962) 307 Fed. 2d 104, 115, has summarized the law applicable here as follows:

> "The Supreme Court found that the question of whether there has been a gift, for income tax

purposes, is a question of fact, and not a question of law; and the clearly erroneous test applies even though it seems the basic facts are undisputed. A finding of fact is a finding based on the 'fact-finding' tribunal's experience with the mainsprings of human conduct. A conclusion of law would be a conclusion based on application of a legal standard." (P. 115)

"Rule 52 (a) should be construed to encourage appeals that are based on a conviction that the trial court's decision has been unjust." (P. 114)

A finding of fact is clearly erroneous when, although here is evidence to support it, the reviewing court is eft with the definite and firm conviction that a mis-ake has been committed. *Scott Pub. Co. v. Columbia Basin Pub. Inc.* (C.A. 9, 1961) 293 Fed. 2d 15. Find-ngs not supported by the evidence cannot stand. *Union Stock Farms v. Com'r* (C.A. 9, 1959) 265 Fed. 2d 712.

Erroneous inferences derived from the application f a legal standard to undisputed facts lose their in-ulation of the "clearly erroneous concept." *Stevenot v. Norberg,* (C.A. 9, 1954) 210 Fed. 2d 615; *Lundgren v. Freeman,* Supra, p. 115; *Davis v. Park-Hill Good-oe Co.* (Fla., 1962) 302 Fed. 2d 489; *Gilbert v. Com-nissioner,* (C.A. 2, 1957); *Bogardus v. Com'r,* 302 U.S. 34, 82 L. Ed. 38, 58 S. Ct. 61.

The court made the following statements in the Findings of Fact:

"The fact that he, himself, reported the ad-vances from time to time as 'donations' and

'contributions' coupled with the fact that h continued to make advances in very substantia amounts, far, far in excess of the Society's in come, without receiving any note or any othe evidence—even by way of records in the minute —of the Society's promise to repay him, all indi cate that he never actually expected to be repai any of the monies which he continued to advanc (I.R. 18, lines 11-19.)

* * * * * *

"Here, judging from the financial condition c the Society, through the 11 years that Dr. Zim merman kept it in business, he could not reasor ably, at any time, have expected that he would b repaid." (I.R. 20, lines 15-18.)

The court's inference that Appellants never e: pected to be repaid any of the monies they advance is clearly erroneous. The facts are that Appellan not only expected repayment but had ample justific tion in making further advances in the hope that the would be repaid.

When monies were first advanced and acknowledge both the Society and Appellants were aware that th *only source of repayment* was from dues and contrib tions of members. (I.R. 49), (II.R. 50, 14.) In the b ginning Appellants did not expect or anticipate repa ment until about 5 years from the first advances, i about 1949. (I.R. 17-18, 42.) Although the prospe of success seemed to decline, Appellants continued advance money on the assurance (and inducement a promise of success—see excluded evidence, (I.R. 69 in the minutes of the Society that they would be r

aid, and for the purpose of saving the money they ad already advanced. (II.R. 23, 55, 32.)

The partial repayment by the Society of over 10,000.00 about 1949 indicated the chances of eventual ecovery were based on past performance. (II.R. 45.) he court disregarded this evidence even though artial payment on account is strong evidence of a ebt; *Macy v. Com'r,* T. Ct. Memo, 1/18/49.

* * * * * * *

The Society by holding out the prospect of getting 5,000 new members in 18 months through a change in dministration, coupled with the threat of closing "up oop" if he refused to advance more funds, together ith the Society's action, at its annual convention, in cknowledging the indebtedness, and setting up a ethod for repayment, completely justified, FROM IIS STANDPOINT the further advances to the So- iety, and his expectation of payment. (II.R. 32, 23, R. 68-70, 73).*

It is not necessary, for an advance to be a debt, tat there be an unqualified expectation of repay- rent, *McKay Products Corp,* 9 FTC 1082, affirmed (C.A. 3) 178 Fed. 2d 639; *Ewing v. Commissioner,* TC. Mem. 10/4/46; *Macy v. Commissioner,* T.C. Mem. 118/49; *Drachman v. Commissioner,* 23 T.C. 558, 562.

In *Drown v. U.S.* (Cal. 1962) 203 Fed. Supp. 514, 50, the court stated:

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*The matter printed in italics is the substance of the exhibits apearing in full at I.R. 68-70, 73 which are not in evidence but wre offered on the Motion to Reopen Judgment. For the relatie importance of this evidence to the other facts in evidence, se statement of fact in this brief.

"The criterion is whether or not the perso making the advancements considered them to b loans and expected them to be paid. Expectatio of repayment may be based solely on anticipate success of the corporate venture even though suc anticipation flows from an excess of confidenc *Ewing v. CIR,* T.C. Mem. 10/4/46."

See also: *Ewing v. Higgins,* (D.C. N.Y.) 52- U.S.T.C. Sec. 9453; *Byrelite Corp. v. Williams,* (C.A 6) 286 Fed. 2d 285. The court or jury should n speculate or substitute its judgment for that of th creditor's, as to whether the business venture is goo *Ewing v. Higgins,* Supra, (Jury instructions).

The court in its conclusions of law stated:

"From the above analysis, it clearly appea that none of the normal indicia of a classic de appear in this case, save and except that Dr. Zim merman claimed and the Society acknowledge an obligation for the money he advanced to it (I.R. 20, lines 23-26.)

The court in making this statement ignored the pr vious recital in the findings:

"Dr. Zimmerman testified that the Society h repaid him $10,000.00, at what time was n specified." (I.R. 14, lines 5-6.)

However, he testified in this connection on cro examination:

"They paid one back about $10,000.00 at o time; That was about in . . . oh, around '47, '48, '49. I am not too sure about that." (II.R. 45, lin 9-12.)

Exhibit 18 (I.R. 72), offered and refused by the urt on Motion to Reopen, clearly shows the payment n account to be credited against his advances as 0,820.63 on February 22, 1950.

This payment on account was substantial evidence a debt. *Bunker Hill & Sub. Min. Co. v. Commissioner,* (1943) 1 T.C. 1057; *American Zinc L.&S. Co. Commissioner,* T.C. Mem. 5/26/43; *Macy v. Commissioner,* T.C. 1/18/49.

The court should not have disregarded these facts thout cause. *Yip Mie York v. Dulles,* (C.A. 9, 1956) 7 Fed. 2d 383; *Joseph v. Donover,* (C.A. 9, 1958) 261 d. 2d 812.

Likewise, another indicia of a debt, which the court nored without cause, was the consistent treatment the advances as loans on the books and records of e Society and Appellants. *Maloney v. Spencer,* (.A. 9, 1949) 172 Fed. 2d 638; *W. J. Jones & Son v. S.* (1951, D.C. Ore.) 52-1 U.S.T.C. Sec. 9150.

It is interesting that the court, in its Conclusion of Law, stated, as an apparent "indicia of no debt":

> "Also where, as here, no attempt is made to enforce collection, such facts tend to support an inference that at the time the advances were made, the parties did not truly intend that they should give rise to enforceable debts." (I.R. 20, lines 19-22.)

This court has held that failure to attempt to collect a debt does not destroy its character as such. *Earle v W. J. Jones, Inc.* (C.A. 9), 200 Fed. 2d 846. Even

under the facts recited by the court the circumstance did not justify an attempt to collect the debt.

Also, the expressed intent of the parties, particu larly of the taxpayer, is a relevant factor, and som "indicia" in determining the existence of a deb *Brinker v. U.S.* (D.C. Cal.) 116 F. Supp. 294, aff'd (C.A. 9) 221 Fed. 2d 478.

Finally, the court in its conclusions of law state that even though these advances could be held to be debt they could not be held to be a business debt b cause he "sparked" the organization for all the hea ing professions. (R. 21.) The court completely ignore the testimony of Dr. Zimmerman relating to the fa that the debt was created to assist him in producin income when he had no other occupation, throug the publication of a professional journal and also i his practice of naturopathy. (II.R. 51-2) (II.R. 7-8 This was sufficient to make the debt a business de under the Internal Revenue Code, notwithstanding t additional motives (emphasized by the court) th induced him to organize the Society. All that is r quired is a proximate connection between the lo claimed and the business or profession of the taxpay *Tony Martin,* 25 T.C. 94; *Lawrence Weil Estate,* T.C. 366; *Erica Giepan,* T.C. Memo. 1957-6; *Hen Protzman,* T.C. Memo. 1959-105. See Treasury D partment Regulations 1, 166-5(b), 1 Fed. Tax Reg lations 1962, p. 258. However, the court made no fin ings of fact supporting this conclusion of law so t conclusion should not stand. *Gilbert v. Commissione* (C.A. 2, 1957) 248 Fed. 2d 399, 408.

CONCLUSION

It is respectfully submitted that the Findings of act and Conclusions of Law were clearly erroneous d that the court abused its discretion in denying ppellants an opportunity to reopen the judgment. or these reasons the Judgment should be reversed d a new trial granted.

Dated, Honolulu, Hawaii,
February 18, 1963.

Respectfully submitted,
KENNETH E. YOUNG,
Attorney for Appellants.

CERTIFICATE

I certify that, in connection with the preparation of is brief, I have examined Rules 18 and 19 of the Jnited States Court of Appeals for the Ninth Circuit, d that, in my opinion, the foregoing brief is in full mpliance with those rules.

KENNETH E. YOUNG,
Attorney for Appellants.

(Appendix Follows)

Appendix.